NEPTUNE AVIATION LTD v. SHEIKH SALLEH SHEIKH ABOD & ANOR (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN JC
[SUIT NO: WA-22NCC-127-04-2018]
19 SEPTEMBER 2018

CIVIL PROCEDURE: *Service – Personal service – Application for an order to dispense with personal service of interim injunction order – Attempts made to personally serve copy of sealed interim injunction on first defendant unsuccessful – Copy of interim injunction order left at first defendant's address – Whether first defendant had knowledge of interim injunction order – Whether plaintiff could apply for such order prior to commencement of enforcement proceedings – Whether court ought to exercise its discretion to dispense with personal service of order – Rules of Court 2012, O. 45 rr. 5 & 7(2), (7)*

This was an application by the plaintiff for an order, *inter alia*, to dispense with personal service of the interim injunction order granted by the court upon the first defendant ('D1') pursuant to O. 45 r. 7(7) of the Rules of Court 2012 ('ROC'). The plaintiff was a company primarily engaged in the business of leasing/trading and asset management of aviation assets. D1 was a director of the plaintiff and held the role of Managing Director. D1 was also a director and majority shareholder of the second defendant (D2) a company which carries the business of an airline carrying passengers and cargo. At all material times, the plaintiff was the legal owner of an aircraft Boeing 737 – 400 ('subject aircraft.') As the owner of the subject aircraft, all the aircraft's continuing airworthiness records, log books, weight schedule and all other documents especially the manuals and technical records ('aircraft documentation') relating to the aircrafts belonged to and was kept by the plaintiff. On 24 January 2018, D1 together with nine individuals with apparent designations or roles in D2 gained access and/or entered the plaintiff's premises and started removing boxes containing the plaintiff's property from the plaintiff's premises, including aircraft documents of the subject aircraft and the plaintiff's books, records and accounts ('listed items'). The plaintiff issued a letter of demand to D1 and D2 for the return of the documents in the listed items but the documents were not returned. The plaintiff then filed a notice of application (encl. 5). The court granted order in terms of certain prayers of encl. 5, which was the interim injunction order referred to in this matter and D1 was compelled to return the listed items. Subsequently, attempts were made to personally serve a copy of the sealed interim injunction order on D1 but were unsuccessful. Thereafter, a copy of the sealed interim injunction order was left at D1's address. On 13 July 2018, the plaintiff received a letter from D1 informing the plaintiff that D1 had now, in compliance with the interim injunction order, arranged for the documents to be delivered to the plaintiff. After the delivery by D1's personnel, the plaintiff discovered that some of the financial documents

which were returned were the plaintiff's old financial documents and were not the financial documents removed from the plaintiff's office on 24 January 2018. It was the plaintiff's intention to commence committal proceedings against D1 for breach of the interim injunction order. However, since the said order had not been personally served on D1, the present application was made *inter alia* pursuant to O. 45 r. 7(7) of the ROC.

Held (allowing application):

(1) Order 45 r. 5 of the ROC provides for the enforcement of orders to do particular acts including enforcement by way of committal proceedings. Under O. 45 r. 7(2) ROC states that an order shall not be enforced under r. 5 unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act. (para 21)

(2) The interim injunction order dated 6 July 2018 ordered D1 to deliver up to the plaintiff the listed items within seven days from the order. The last date for compliance with the interim injunction order was 17 July 2018. D1 was represented by solicitors at all times and the solicitors were present at the time that the interim injunction order was made. The draft interim injunction order was served upon D1's solicitors on 9 July 2018 and was commented upon by them. Solicitors in fact appeared before the Registrar on 12 July 2018 for clarification of the interim injunction order. The sealed interim injunction order was served on D1's solicitors on 12 July 2018. Attempts were made by the plaintiff to personally serve a copy of the sealed interim injunction order on D1 on 13 July 2018 and 16 July 2018 but these attempts were unsuccessful. However, a copy of the interim injunction order was left at D1's address on the morning of 13 July 2018. D1 had referred to the interim injunction order in his letter which accompanied the delivery of documents to the plaintiff. Further and significantly, at no time had D1 denied having personal knowledge of the interim injunction order. (paras 29 & 30)

(3) Whilst the application to dispense with personal service of the interim injunction order could be made in the process of committal proceedings, it was also not wrong for the plaintiff to apply for such an order prior to the commencement of enforcement proceedings. Therefore, since D1 had admitted that he had knowledge of the interim injunction order, this court exercised its discretion to dispense with personal service of the order on D1. (paras 35 & 36)

Case(s) referred to:
AXA China Region Insurance Co Ltd v. Li Yu Ping Ellen [2002] 3 HKC 339 ***(refd)***
Davvy International Ltd And Others v. Tazzyman And Others [1997] 3 All ER 183 ***(refd)***
Madlis Azid & Ors v. Chua Yung Kim & Ors [2013] 2 CLJ 110 HC ***(refd)***
OCM Opportunities Fund II, LP And Others v. Burhan Uray (alias Wong Ming Kiong) And Others [2005] SGHC 81 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 3 r. 2(5), O. 45 rr. 5, 7(2), (7)

Rules of Court [Sing], O. 45 r. 7(7)
Rules of the Supreme Court [UK], O. 45 r. 7(7)
The Rules of the High Court (Cap 54) [HK], O. 45 r. 7(7)

For the plaintiff - Shamala Devi Balasundaram & Ng Ju Lee; M/s Chooi & Company + Cheang & Ariff
For the 2nd defendant - Cherian KC Kuruvila; M/s Feroz & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Chee Lin JC:

[1] This is an application by the plaintiff for an order *inter alia* to dispense with personal service of the interim injunction order dated 6 July 2018 granted by the court ("interim injunction order") upon the first defendant ("D1") pursuant to O. 45 r. 7(7) of the Rules of Court 2012 ("ROC"). I have allowed the application. These are the full reasons for my decision.

Salient Background Facts

[2] The plaintiff is a Labuan company which is primarily engaged in the business of leasing/trading and asset management of aviation assets.

[3] D1 was a director of the plaintiff from 3 September 2015 until 29 January 2018. He held the role of managing director of the plaintiff until on or about 19 June 2017.

[4] D1 has been a director of the second defendant ("D2") since 18 September 2015 and is also a majority shareholder in D2. D2 is a Malaysian company which carries on business of an airline carrying passengers and cargo.

[5] At all material times, the plaintiff is the legal owner of the aircraft known as Boeing 737-400 aircraft bearing manufacturer's serial number (MSN) 26452, 9M-MMX together with two CFMI CFM56-3C1 engines bearing ESN 856691 and 856229 ("subject aircraft"). This is not disputed.

[6] As the owner of the subject aircraft, all the aircraft's continuing airworthiness records, log books, weigh schedule, manuals, maintenance reports, technical data and all other documents especially the manuals and

technical records ("aircraft documentation") relating to the aircrafts together with any documents to release any encumbrance on the aircrafts belong to and shall be kept by the plaintiff.

[7] On 24 January 2018, at or about lunch time, D1 together with nine individuals with apparent designations or roles in D2 gained access and/or entered the plaintiff's premises and started removing boxes containing the plaintiff's property from the plaintiff's premises. At the material time, D1 was a director of the plaintiff. The boxes were transported away with the help of D2's employees and representatives.

[8] The documents removed from the plaintiff's premises are said to include aircraft documents of the subject aircraft and the plaintiff's books, records and accounts ("listed items").

[9] The plaintiff issued a letter of demand dated 2 March 2018 to D1 and D2 for the return of the documents in the listed items but the documents were not returned.

[10] The plaintiff then filed a notice of application (encl. 5) which was heard *ex parte* on 11 April 2018. The court granted an *Anton Piller* order on 11 April 2018 but directed that prayers 8, 9 and 10 of encl. 5 be heard *inter partes* at a later date.

[11] On 6 July 2018, this court granted order in terms of prayers 8, 9 and 10 of encl. 5, which is the interim injunction order referred to in this matter. Prayer 2 of the interim injunction order compels D1 to return the listed items, which is the aircraft documentation and the plaintiff's books, records and accounts as set out in schedule 2 appendix A and B within seven days of the date of the interim injunction order.

[12] On 9 July 2018, the plaintiff's solicitors sent a copy of the draft interim injunction order to D1's solicitors for their comments and approval. As D1's solicitors had not reverted within two days, the plaintiff's solicitors filed the draft interim injunction order on 11 July 2018 morning. This was met with opposition from D1's solicitors and accordingly, the plaintiff's solicitors requested an appointment before the Registrar on 12 July 2018 for clarification.

[13] On 12 July 2018 morning, the plaintiff's solicitors and D1's solicitors clarified the terms of the interim injunction order before the Registrar. The Registrar did not accept the proposed amendments made by D1's solicitors to the draft interim injunction order and proceeded to seal the draft interim injunction order as filed by the plaintiff's solicitors on 11 July 2018. A copy of the sealed interim injunction order was served on D1's solicitors on 12 July 2018 afternoon. This is not in dispute.

[14] Attempts were made to personally serve a copy of the sealed interim injunction order on D1 on 13 July 2018 and 16 July 2018 but those attempts were unsuccessful. A copy of the sealed interim injunction order was left at D1's address after the unsuccessful attempts.

[15] On 13 July 2018 morning, the plaintiff's solicitors received a letter from D1's solicitors informing the plaintiff that in respect of the documents in D1's possession as taken on 24 January 2018, D1 has now in compliance with the interim injunction order arranged for the documents to be delivered at the plaintiff's office between 4pm to 5pm on 13 July 2018.

[16] At 5.45pm on 13 July 2018, D1's personnel arrived at the plaintiff's office and delivered 29 boxes containing some of the plaintiff's financial documents and certain aircraft 9M-MMX documents and one box which only contained a printer. The plaintiff contends that besides the cheque book which was returned, other financial documents which were returned on 13 July 2018 were the plaintiff's old financial documents that were previously stored in D2's office and were not the financial documents removed from the plaintiff's office by D1 on 24 January 2018.

[17] D1 gave the plaintiff a cover letter dated 13 July 2018 signed by D1 through his personnel upon the delivery of the 30 boxes. The letter made reference to the interim injunction order and enclosed a shifting in/shifting out form by DATS Management Sdn Bhd ("shifting form") D1 filled up on 24 January 2018 during the removal of the documents from the plaintiff's office which purportedly states that only 30 boxes of documents were removed out of the plaintiff's office. The plaintiff's representative refused to acknowledge receipt since the contents of the boxes were not verified. The transport representative lodged a police report on this matter.

[18] The plaintiff contends that D1 has not complied with the interim injunction order. There was an exchange of correspondence between the plaintiff and D1's solicitors where the plaintiff demanded the remainder of the aircraft documentation and the plaintiff's books, records and accounts according to schedule 2, appendix A and B of the interim injunction order. An inspection report prepared by the plaintiff's representative which has shown the documents not returned by D1 was also enclosed in the correspondence to D1's solicitors.

[19] D1 contends that he has fully complied with the interim injunction order and has returned all the documents he took from the plaintiff's premises on 24 January 2018.

[20] It is the plaintiff's intention to commence committal proceedings against D1 for breach of the interim injunction order. Since the said order has not been personally served on D1, the present application is made *inter alia* pursuant to O. 45 r. 7(7) of the ROC.

Findings Of The Court

[21] Order 45 r. 5 of the ROC provides for the enforcement of orders to do particular acts including enforcement by way of committal proceedings. Order 45 r. 7(2) of the ROC states that an order shall not be enforced under r. 5 unless a copy of the order has been served personally on the person

required to do or abstain from doing the act in question; and in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

[22] Order 45 r. 7(7) of the ROC states that service of a copy of an order under O. 45 can be dispensed with by the court if the court thinks it just to do so:

> (7) Without prejudice to its power under Order 62 rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

[23] In *Davvy International Ltd And Others v. Tazzyman And Others* [1997] 3 All ER 183 (Court of Appeal), when considering O. 45 r. 7(7) of the Rules of Supreme Court (which is in *pari materia* with O. 45 r. 7(7) of Rules of Court 2012), the court held that O. 45 r. 7(7) can be exercised to dispense with personal service of a mandatory order not only prospectively, but also retrospectively.

[24] The Hong Kong Rules of the High Court O. 45 r. 7(7) is in *pari materia* with O. 45 r. 7(7) of the English Rules of Supreme Court and the Hong Kong case of *AXA China Region Insurance Co Ltd v. Li Yu Ping Ellen* [2002] 3 HKC 339 (Court of Appeal) expounds on this principle in *Davvy International* at para. 32:

> The determination was that that paragraph of the rule conferred upon the court a power to dispense with service of a copy of a mandatory order, not only prospectively, that is, before the time of compliance with the order had expired, but also retrospectively.

[25] In *AXA China Region Insurance Co Ltd v. Li Yu Ping Ellen* [2002] 3 HKC 339 (Court of Appeal), the Court of Appeal dispensed with personal service of the order pursuant to O. 45 r. 7(7) of the Hong Kong Rules of the High Court because the court found that the defendant was aware of the terms of the order:

(i) The plaintiff obtained an *ex parte* injunction requiring the defendant to deliver up of all such documents in her possession by 16 November 2000 (the first order). The first order was endorsed with a penal notice and served personally upon the defendant on 14 November 2000. The plaintiff contended that the defendant did not deliver up all the requested documents by the deadline on 16 November 2000 and a further order was made on 17 November 2000 where, by consent, the first order was varied to require delivery to be no later than 27 November 2000 (the second order). The second order was not served personally on the defendant but upon her solicitors by hand on 22 November 2000.

(ii) No further documents were delivered by the defendant, and the defendant filed an affirmation stating that she had complied with the first order. The plaintiff maintained its stance that the defendant did not deliver up all the documents in her possession and commenced

committal proceedings. Leave was granted to commence committal proceedings and the defendant was sentenced to prison for two months at the outcome of the committal proceedings. The defendant appealed and argued that the second order which she was required to comply was not personally served on her and is an irregularity.

(iii) The Hong Kong Court of Appeal applied the principle in *Davy International* and held that where there has been a failure to serve an order which requires a person to do an act, the court may exercise its power under O. 45 r. 7(7) to dispense with service, and may do so retrospectively (paras. 34 and 35).

(iv) The court also found that the defendant was aware of the terms of the first order and the variation of the second order, to allow the failure to effect personal service of the second order to render the committal proceedings invalid would not be in the interest of justice (paras. 45 to 47).

[26] In the Singapore case of *OCM Opportunities Fund II, LP And Others v. Burhan Uray (alias Wong Ming Kiong) And Others* [2005] SGHC 81 (High Court), the plaintiff commenced committal proceedings against the contemnors for failing to comply with their disclosure obligations under the *Mareva* injunction and the permanent injunction, and failed to attend court for cross-examination pursuant to the order for cross-examination and the peremptory order. The contemnors resisted the proceedings principally on the procedural ground that they were not served personally with the orders.

[27] The Singapore High Court found that O. 45 r. 7(7) of the Rules of Court (in *pari materia* with O. 45 r. 7(7) of Malaysia's Rules of Court 2012) gave the court an unfettered discretion to dispense with personal service and the discretion could be exercised whenever the court thought it just to do so. The court held that the majority defendants were undoubtedly aware of the terms of the order for cross-examination, peremptory order and permanent injunction and were also alive to the consequences of non-compliance therefore it was just to dispense with personal retrospectively of those orders (paras. 23 and 25).

[28] In Malaysia, *Madliz Azid & Ors v. Chua Yung Kim & Ors* [2013] 2 CLJ 110 (High Court), the court followed *Davy International* and granted dispensation of service of mandatory order which ordered the first defendant to deliver the title deeds of 98 parcels of lands to the plaintiff's solicitors within seven days of the judgment. The court found that the first defendant knew the terms of the judgment although it was not personally served on him because, *inter alia* (para. 14):

(i) The plaintiff's statement of claim had claimed for the specific prayer which required him to deliver the title deeds and the first defendant knew throughout the legal proceedings that was the main order directed against him;

(ii) The first defendant was represented throughout the proceedings;

(iii) The plaintiff's solicitors sent a draft copy of the judgment to the first defendant's solicitors and the first defendant's solicitors duly approved it;

(iv) The first defendant's solicitors were served with a copy of the sealed and extracted judgment; and

(v) The first defendant knew that the judgment was obtained against him when he instructed his solicitors to apply to stay execution of the judgment and appeal against the order.

[29] In this case, the interim injunction order is dated 6 July 2018 and ordered D1 to deliver up to the plaintiff the listed items as listed in schedule 2, appendix A and B within seven days from the order. The last date to comply with the order would be 17 July 2018 as, pursuant to O. 3 r. 2(5) of the ROC, it is provided that where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

[30] The last date for compliance with the interim injunction order was 17 July 2018. It is not disputed that the interim injunction order was not personally served upon D1 before 17 July 2018. However, the following is also not disputed:

(i) D1 was represented by solicitors at all times and the solicitors were present at the time that the interim injunction order was made.

(ii) The draft interim injunction order was served upon D1's solicitors on 9 July 2018 and was commented upon by them. Solicitors in fact appeared before the Registrar on 12 July 2018 for clarification of the interim injunction order.

(iii) The sealed interim injunction order was served on D1's solicitors on 12 July 2018.

(iv) Attempts were made by the plaintiff to personally serve a copy of the sealed interim injunction order on D1 on 13 July 2018 and 16 July 2018, as seen in encls. 83 and 84. These attempts were unsuccessful. As noted at para. [16] of *Madlis Azid* case, the fact that the process server was unable to serve the judgment does not change the extant knowledge of the first defendant in that case.

(v) A copy of the interim injunction order was left at D1's address on 13 July 2018 morning.

(vi) D1 referred to the interim injunction order in his letter dated 13 July 2018 which accompanied the delivery of documents to the plaintiff on 13 July 2018. The letter states "We refer to the above matter and the court order dated 6 July 2018" and was personally signed by D1.

(vii) Further and significantly, at no time has D1 denied having personal knowledge of the interim injunction order.

[31] In fact, in D1's submission, D1 had admitted that it is clear that he had known of the interim injunction order.

[32] D1 submitted that he has complied with the interim injunction order and therefore the order is exhausted or spent and the court should not grant the order sought by the plaintiff. I am of the view that I should not in this application determine the issue whether D1 had complied with the interim injunction order or not. That is the issue to be determined in the committal proceedings which the plaintiff intends to bring and which the plaintiff has the right to bring, whether they be successful or not.

[33] All I have to decide in this application is whether, in the circumstances of the case, it would be just to dispense with personal service of the interim injunction order on D1. Since D1 has admitted that he had knowledge of the interim injunction order, I am of the view that it would be just to dispense with personal service of the order on D1.

[34] D1 objected to the plaintiff's application on the grounds that the plaintiff did not make any attempt to serve the order personally on him prior to 13 July 2018. I have already decided that the relevant date for D1 to comply with the interim injunction order is 17 July 2018 and not 13 July 2018. It is obviously not feasible for the plaintiff to attempt personal service of the sealed interim injunction order on D1 prior to 13 July 2018 because the order was only sealed on 12 July 2018 and the plaintiff had attempted personal service of the sealed order on D1 on 13 July 2018 and 16 July 2018 but were unsuccessful. Finally, the plaintiff left a copy of the sealed interim injunction order at D1's address after the unsuccessful attempts to serve him personally.

[35] D1 also objected to the application on the basis that it was not made in the process of enforcement proceedings. Whilst the application to dispense with personal service of the interim injunction order can be made in the process of committal proceedings, it is also not wrong for the plaintiff to apply for such an order prior to the commencement of enforcement proceedings. Accordingly, this is not a valid objection to the granting of the order sought by the plaintiff.

[36] Since D1 had admitted that he had knowledge of the interim injunction order, I would exercise my discretion to dispense with personal service of the order on D1. Accordingly, I would grant an order in terms of prayers (1), (2) (4) and (5) of the application and dispense with personal service of the interim injunction order on D1. There will be no order as to costs.